No. 62.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

FEDERAL TRADE COMMISSION,
Petitioner,

v.

COLGATE-PALMOLIVE COMPANY and
TED BATES & COMPANY, INC.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR RESPONDENT COLGATE-PALMOLIVE COMPANY.

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November 3, 1964.

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BRIEF FOR RESPONDENT COLGATE-PALMOLIVE COMPANY.

Opinions Below and Jurisdiction.

References to the opinions below and to the basis for jurisdiction of this Court are contained in the brief of Petitioner, the Federal Trade Commission (hereinafter the "Commission").*

Questions Presented.

(1) Whether a television advertisement communicating a completely truthful claim as to the quality or merits of a product is illegal under the Federal Trade Commission Act solely because of the undisclosed use of a mock-up or prop.

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* As to jurisdiction, however, see the second "Question Presented", *infra*, and Point IV hereof.

(2) Whether the instant writ is timely in view of the manner in which the Commission has disregarded the jurisdictional limitations imposed by Congress under the Federal Trade Commission Act and the Judicial Code.

Statutes Involved.

The Federal Trade Commission Act.

The Commission's brief sets forth portions of Sections 5(a)(1) and 5(a)(6) of the Act which bear upon the first question presented to this Court.

The following provisions of the Act are relevant to the second question presented to this Court:

Section 5(c) of the Act defines the powers of courts of appeals in reviewing cease and desist orders of the Commission and states in relevant part that a court of appeals

> "... shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission. . . .
>
> * * * * * *
>
> "The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 347 of Title 28" (15 U. S. C. §45(c)).*

Section 5(i) of the Act defines the procedure to be followed by the Commission in the event that a judgment and decree of a court of appeals, which sets aside or modifies an FTC cease and desist order, has become "final" under Section 5(c). It provides:

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* Section 5(d) of the Act provides that

> "Upon the filing of the record with it the jurisdiction of the court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive" (15 U. S. C. § 45(d)).

> "If the order of the Commission is modified or set aside by the court of appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered in accordance with the mandate of the court of appeals shall become final on the expiration of thirty days from the time such order of the Commission was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so that it will accord with the mandate, in which event the order of the Commission shall become final when so corrected" (15 U. S. C. §45(i)).

The Judicial Code.

Section 2101 of the Judicial Code, also relevant to the second question presented, provides in part:

> "(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days" (28 U. S. C. §2101(c)).

Statement.

This proceeding stems out of the use, in 1959, of three television advertisements of Palmolive Rapid Shave, a product of Colgate-Palmolive Company (hereinafter "Colgate"). The advertisements portrayed, among other things, the shaving of the human beard and the shaving of sandpaper after the application of Palmolive Rapid Shave. The

advertisements used a plastic "mock-up" as a substitute for sandpaper; it is undisputed that sandpaper does not properly reproduce on television.*

The complaint of the Commission charged that Colgate and its advertising agency, Respondent Ted Bates & Company, Inc. (hereinafter "Bates"), had violated Section 5 of the Act in the portrayal of the shaving of sandpaper. No charge was brought with respect to those portions of the advertisements which portrayed the shaving of the human beard after the application of Palmolive Rapid Shave.

The Hearing Examiner dismissed the complaint after hearing.

The First Order and Opinion of the Commission.

On December 29, 1961, the Commission reversed the ruling of its Hearing Examiner. It held (1) the particular grade of sandpaper as seen by viewers could not be shaved as easily and quickly as the advertisements indicated (a holding which the Court below upheld in its first opinion and which Colgate and Bates have not thereafter challenged) and (2) even if sandpaper could be shaved precisely as shown in the advertisements and despite the fact that sandpaper does not properly reproduce on television, the use of a mock-up for sandpaper was itself an independent illegal practice violative of the Act (R. 9 *ff.*).

It is the ruling of the Commission on this second point which is the sole substantive issue before this Court. From the time of its first opinion through two thorough reviews by the Court of Appeals for the First Circuit and in its

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* The Court below stated:

> "As the examiner found on undisputed testimony here, the shaving of sandpaper, even when in fact accomplished, does not properly reproduce on television and must be simulated to be effective" (R. 39).

brief to this Court, the Commission has persistently asserted that a material deception occurs if an undisclosed mock-up is used in a completely accurate portrayal of a test, experiment or demonstration.

This position of the Commission has been twice presented to, thoroughly considered, and rejected by the Court below.

The November 20, 1962 Mandate of the First Circuit.

In its first review, the Court found that respondents' "only offense was the making of a single misrepresentation about a single product", *i.e.*, exaggeration of the facility with which sandpaper could be shaved after the application of Palmolive Rapid Shave (R. 42). The Court observed that the case was "trivial" and suggested that "little injury was done to the public by respondents' representations" (R. 68).

As to the issue before this Court, the Court below rejected all of the arguments put forward by the Commission to justify its ruling that a truthful mock-up* was materially deceptive. The Court stated:

> "But we are unable to see how a viewer is misled in any material particular if the only untruth is one the sole purpose of which is to compensate for deficiencies in the photographic process. The Commission has put the shoe on the wrong foot. What the viewers are interested in, and moved by, is what they see not by the means" (R. 40).
>
> * * * * * * *
>
> "But where the only untruth is that the substance he sees on the screen is artificial, and the visual appear-

* For purposes of brevity, the phrase "truthful mock-up" is used throughout this brief to designate the issue in the first Question Presented.

> ance is otherwise a correct and accurate representation of the product itself, he is not injured. The viewer is not buying the particular substance he sees in the studio; he is buying the product. By hypothesis, when he receives the product it will be exactly as he understood it would be. There has been no material deceit" (R. 41-42).

The Court, in ruling that the Commission was in "fundamental error" on the truthful mock-up question (R. 42), left no room for distinctions between experiments, tests, demonstrations, illustrations, portrayals, etc. Instead, as its quoted language shows, the Court saw no illegality of any kind in the use of a mock-up where the claims made by the advertiser for the product were in fact true in every respect. The Court then set the Commission's order aside, warning that it had "undercut" the basis of an order against mock-ups as such (R. 42) and directing that a new order be prepared by the Commission "in accordance with this opinion" (R. 43).

The Commission's Disagreement with the November 20, 1962 Mandate of the First Circuit.

The Commission did not move for a rehearing before the First Circuit regarding that Court's November 20, 1962 decision and decree, nor did it seek review by certiorari to this Court.

Instead, the Commission, without further briefs or oral argument, issued on the same record a second opinion and a proposed final order under date of February 18, 1963 (R. 44 *ff.*). In its second opinion, the Commission stubbornly held to its position that a truthful mock-up was illegal if used to portray anything other than an "incidental" aspect of an advertisement (R. 51).

The November 20, 1962 mandate of the First Circuit had not ordered or invited a restatement of position by the Commission. Nevertheless, the Commission did so, in part on the stated ground that its first "opinion failed to spell out sufficiently the theory of law on which the order was based . . ." (R. 48).

Exceptions to the Commission's second opinion and proposed order were filed by Colgate and Bates on April 15, 1963.*

In response to these exceptions, the Commission issued a third opinion and order on May 7, 1963. Once again, the Commission reiterated its assertion that a truthful mock-up when used in a "demonstration" violated the Act (R. 93 *ff.*).

The Commission's third order (which is the order before this Court) prohibited Colgate, *inter alia*, from:

> "Unfairly or deceptively advertising any such product by presenting a test, experiment or demonstration that (1) is represented to the public as actual proof of a claim made for the product which is material to inducing its sale, and (2) is not in fact a genuine test, experiment or demonstration being conducted as represented and does not in fact constitute actual proof of the claim, because of the undisclosed use and substitution of a mock-up or prop instead of the product, article or substance represented to be used therein" (R. 93-94).**

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* In its exceptions, Colgate argued, *inter alia*, that the Commission's latest action did not conform to the mandate of the Court of Appeals, which the Commission had not sought to modify or reverse by seeking judicial rehearing or certiorari (R. 61 *ff.*). Colgate also urged that the Commission's restatement of its already-rejected position on the mock-up issue disregarded the governing limitations set forth in Section 5(i) of the Federal Trade Commission Act (R. 63 *ff.*).

** The order thus applies to all advertising and is not restricted to television.

Thereafter, Colgate filed with the Commission on June 6, 1963 a motion to correct its third order, which motion the Commission denied on the ground that the motion was based upon "the mistaken premise that the Commission's final order is in conflict with the prior decision and mandate of the Court of Appeals for the First Circuit" (R. 119).

Colgate also filed on June 6, 1963 with the Court of Appeals for the First Circuit a petition seeking to correct, review and set aside the third order of the Commission (R. 99).

The December 17, 1963 Decision of the First Circuit.

The second review by the Court below, based on full briefing and oral argument, resulted in the December 17, 1963 opinion and decree which the Commission challenges before this Court. In its opinion, the Court of Appeals noted that the Court of Appeals for the Fifth Circuit had, in the interim, agreed with it that truthful mock-ups were not, *per se,* violative of law (R. 131).*

The Court of Appeals declared that the Commission was not legally free to ignore its earlier decision on review, citing Section 5(i) of the Act (R. 132):

> "Prior to the issuance of its new order in final form the Commission handed down a fifteen-page opinion hereinafter the 'second opinion,' in which it recited that our 'various suggestions' 'in substantial part have been accepted.' We reached a number of conclusions not labelled suggestions which the

* The Commission's brief neglects to inform this Court that in *Carter Products, Inc.* v. *Federal Trade Commission,* the Fifth Circuit stated of the first decision of the Court below:

> "[W]e consider the standards worked out in that opinion well reasoned, in keeping with the principles established in non-television cases, and applicable to the case now before us." (323 F. 2d 523, 528 (5th Cir. 1963).

> Commission was not free to disregard under the mandate. 15 U. S. C. A. §45(i); . . ." (R. 132).*

Commenting on whether the Commission had complied with the requirements of Section 5(i), the Court quoted the following description of the Commission's reaction to the Court's earlier mandate: "The Commission has not capitulated, but has merely withdrawn to regroup its forces" (R. 132).** The Court also stated, "The Commission's response is that if it has departed from our opinion, it is because we misunderstood its original intention, due in large measure to 'extreme arguments' made by its counsel" (R. 132).

Nevertheless, in view of "the Commission's antipathy to mock-ups", the Court agreed to "make an exception and re-examine [the Commission's] present position on the merits rather than from the limited standpoint of whether it comports with our previous opinion" (R. 133).

After such consideration, the Court fully confirmed its holding on the first review that a truthful mock-up does not violate the Act:

> "We are considering no basic deception, but only the situation where, in illustrating faithfully a test which has been actually performed, an advertiser uses some foreign mock-up or makeup. As we stated in our previous opinion, so far as deceit is concerned, the buyer is interested in what he thinks he sees, and if what he buys can do and has done exactly what he thinks he sees it do, he has not been misled to any substantial degree" (R. 136).

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* Section 5(i) requires that after the court of appeals has issued a judgment or decree modifying or setting aside an order of the Commission, all further administrative action must be pointed to the preparation of a new order "rendered in accordance with the mandate of the court of appeals."

** The observation was made in 38 Notre Dame Law. 350, 354 (1963). Various law review comments on this case are cited in the petition for certiorari, p. 8, n. 3.

"If there is an accurate portrayal of the product's attributes or performance, there is no deceit" (R. 138).

In arriving at this conclusion the Court carefully examined the Commission's view that there is a vital distinction between a truthful mock-up in an advertisement which "proves" visually in a "demonstration" a quality of the product (held to be illegal by the Commission) and a truthful mock-up in an advertisement which "portrays" or "illustrates" a quality of the product (held to be legal by the Commission) (R. 133-38). The Court noted that this attempted distinction was emphasized at oral argument when counsel for the Commission stated that an ice cream manufacturer could legitimately use a delicious-looking mock-up for his ice cream since a portrayal of such a mock-up would not constitute visual "proof" (R. 134).

The Court's reanalysis, which again rejected the Commission's position, was:

1. There is no logical difference between the delicious-looking ice cream example and a mock-up deemed illegal by the Commission. The ice cream portrayal can just as logically be deemed an attempt to "prove" a quality or appearance of the product (R. 135) and can just as logically make an implied representation that the ice cream is real (R. 137-38). Indeed, it would be paradoxical to hold that a mock-up of the product itself was legal while a truthful mock-up of an incidental substance—*e.g.*, sandpaper in a shaving cream advertisement—would violate the Act (R. 138).

2. The Court found that, as a result of the Commission's illogic, there was great practical difficulty in trying to make distinctions between a "test" and an "illustra-

tion" and between "proof" and "non-proof". It considered examples such as blue bedsheets (appearing white on television) being removed from a washing machine, adults and children swallowing delicious medicines, etc. (R. 135-36) and also noted that the Commission had not discussed in its second and third opinions similar difficulties which the Court had laid bare in its first opinion.* Citing the decision of this Court in *Federal Trade Commission* v. *Henry Broch & Co.*, 368 U. S. 360, the Court of Appeals found that the order was incapable of practical interpretation (R. 136). This finding, it stated, stemmed from a more fundamental flaw: the Court could perceive "no substantial logical difference between what the Commission disapproves of and what it accepts" (R. 135).

3. The Court repeated the views expressed in its November 20, 1962 decision that the Commission's attack on truthful mock-ups had lost sight of the issue framed by the Commission itself. By hypothesis, the mock-up perfectly represents reality. The Commission once again tended to overlook this and "in speaking of the buyer's 'disillusionment,' proceeds as if he would learn of the mock-up, but would not learn that no quality or characteristic of the product had been misrepresented" (R. 137).

4. The Court exposed the fallacy in the Commission's proposition that a test should be "genuine" because it gives to the viewer proof going beyond the advertiser's "word" alone. The Court took judicial notice that television com-

* Two examples specifically mentioned by the Court were (1) the legality of a mock-up used in place of a testimonial which had been actually received (R. 137); and (2) use by an advertiser of a genuine article he knows television reproduction will substantially upgrade (R. 138).

mercials are normally pre-recorded. A pre-recorded test did not disturb the Commission; yet by the use of pre-recording there was only the advertiser's "word" that the test could always be carried out and that the particular instance in which it was recorded was not a rare exception. The Court ruled that there was little difference between taking the advertiser's word that the depicted test could always be carried out and taking his word that the depicted test was in other respects a faithful reproduction of an actual test (R. 137).

5. The Court therefore confirmed its original holding that the Commission's self-styled "theory of law" (R. 48) was irrational. The "theory" created the wrong implication. Instead, the fundamental and practical representation to be implied under the statute is that no inaccuracy has been introduced into the picture by the "photographic process" (R. 138). This, said the Court, would be a principle capable of universal application and would include all demonstrations of any kind (*Ibid.*). It would also provide a valid basis for judging the legality of other examples which the Court had mentioned in its first opinion and which the Commission had failed thereafter to discuss. Succinctly put, the principle would be: "If there is an accurate portrayal of the product's attributes or performance, there is no deceit" (*Ibid.*).

6. Having reaffirmed its November 20, 1962 mandate the Court decided that the third order of the Commission suffered from the same flaw as the first in that the basic criterion of legality announced by the Court had no special relationship to mock-ups. For that reason it declined to amend the Commission's third order (R. 139). "Accordingly," said the Court, "we instruct the Commission as

we thought we had directed it before, to enter an order confined to the facts of this case, where respondents used a mock-up to demonstrate something which in fact could not be accomplished'"* (R. 139). As in its first decree, the Court's confirming mandate left to the Commission the framing of the detailed terms of an order within the limits set by the Court's opinion.

The Commission thereupon filed for the first time a petition for a writ of certiorari on April 15, 1964, which writ was granted on May 25, 1964. The writ is not addressed to the issue of whether the Commission's third order was rendered in accordance with the Court's November 20, 1962 mandate. Instead, it seeks a review of the validity of the underlying theory of law which has been found to be illogical by the Courts of Appeals for the First and Fifth Circuits.

SUMMARY OF ARGUMENT.

I.

In attempting to determine whether a television advertisement is materially deceptive under the Federal Trade Commission Act, the Federal Trade Commission has erroneously and illogically looked to the physical nature of the object before the camera, rather than the image which is projected electronically upon the television tube and seen by viewers. As the Court below held after two thorough

* The Commission's brief claims that the portion of the Commission's order addressed to this aspect of the advertisements was sustained by the Court below (p. 6). This claim is incorrect. In its second review, the Court of Appeals declined to "comment on the precise terms of an order *in vacuo*." It held that "the Commission has been preoccupied with its broad opposition to mock-ups and has never expressed its views with respect to the proper scope of an order directed to more narrowly conceived substantive misconduct," and again remanded to the Commission for still another order (R. 139-40).

reviews of the Commission's position, "What the viewers are interested in, and moved by, is what they see, * * *". Where an advertiser "in illustrating faithfully a test which has actually been performed" uses a prop or mock-up, and "there is an accurate portrayal of the product's attributes or performance, there is no deceit".

The Commission attempts to avoid the inescapable logic in the holding below by putting forward a self-described "theory of law" that the advertiser who uses a mock-up makes an implied representation that he is using the real object, and is thereby guilty of a material misrepresentation. The Court below was correct in ruling that the only representations made are that the claims concerning the product are true and that a demonstration showing this can in actuality be performed exactly as depicted. In any event, even if the implied representation existed, it would be immaterial since it has no meaning for, or interest to, the consumer.

In addition, the Commission has presented no factual proof to substantiate its position that the consumer is deceived by the use of a truthful mock-up. It relies entirely on its own *ipse dixit* for this thesis, despite the fact that its current position represents a complete about-face from its previous stand on this matter.

II.

Because of the basic illogic in the Commission's position, it has been driven into adopting an untenable distinction between mock-ups which "merely . . . portray a sponsor's product or illustrate its use," and those which "purport to prove" a product's quality or use. The Commission espouses the former while condemning the latter. As the Court below pointed out, there is no rational dividing line between the two. The result is an order of the Commission

which is ambiguous and incapable of practical construction because of the basic flaw in the Commission's theory of illegality.

III.

The Commission's argument that the Court below exceeded its powers of judicial review is entirely without merit. The Commission concedes that its order is based upon a "theory of law". The proper interpretation of the Federal Trade Commission Act is ultimately a task for the judiciary. The Court of Appeals, in two careful reviews, did not base its decisions merely upon patent difficulties in administrative application of the Commission's order, or on a weighing of interests. While the Court below used various hypothetical examples to illustrate the difficulties and the irrationality in the Commission's own hypothetical position, its basic purpose was to show that the Commission's theory was not consonant with the Act.

IV.

In any event, the issue to which the instant writ of certiorari is addressed was not timely brought to this Court. Under both the Federal Trade Commission Act and the Judicial Code, the decree of the First Circuit entered on November 20, 1962 was final. Having ignored the mandate in that decree and having entered a new order in defiance thereof, the Commission may not now obtain review on the issue simply because by its actions it has compelled the Court of Appeals to enter a second confirming mandate on the issue identical to the decree of November 20, 1962.

I.

The use of a mock-up in order to portray accurately the attributes of a product is not deceptive.

A. The Visual Result Is the Only Rational Criterion for Judging the Truth of Television Advertising.

The Court below, twice reversing the Commission, has held that the use of a mock-up does not result in deceit where the advertisement, as seen by the viewer, is perfectly accurate.* The Court ruled:

> "What the viewers are interested in, and moved by, is what they see, not by the means." (R. 40); and
>
> "We are considering no basic deception, but only the situation where, in illustrating faithfully a test which has been actually performed, an advertiser uses some foreign mock-up or makeup. As we stated in our previous opinion, so far as deceit is concerned the buyer is interested in what he thinks he sees, and if what he buys can do and has done exactly what he thinks he sees it do, he has not been misled to any substantial degree." (R. 136); and
>
> "If there is an accurate portrayal of the product's attributes or performance, there is no deceit" (R. 138).

The buyer, the Court held, is not interested in the photogenic properties of a product. What he is interested in is whether the actual product he buys will look and perform the way it appeared on his television set.

This is the simple proposition upon which this case rests. Its validity has been demonstrated, inadvertently, by the Commission itself.

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* As noted, the Court of Appeals for the Fifth Circuit—the only other Court which has considered the issue—reached the same conclusion. *Carter Products, Inc.* v. *Federal Trade Commission*, 323 F. 2d 523 (5th Cir. 1963).

In its first opinion the Commission found that the "clinching argument made by the commercials"—that which persuaded viewers to buy the product—was " 'By golly, it really *can* shave sandpaper' " (R. 21) (emphasis in original). Both the Commission's second opinion and brief to this Court quote this very finding of the Commission (R. 50, Gov. Br. 11). Yet "By golly, it really *can* shave sandpaper" pertains solely to the substantive claim of the advertising and has nothing to do with the use or non-use of a mock-up. The Commission thus in this instance recognized that a buyer's real concern is with the truth of the substantive claims or promises made to him, not with the means used to make them. Since, under the hypothesis adopted by the Commission to create the sole issue before this Court, Palmolive Rapid Shave has the very effects on sandpaper which the advertisements claimed for it, it follows that no deceit occurred from the mere use of a mock-up in the instant advertising—or would occur from the many hypothetical examples considered in the record.

The other side of the coin is equally simple. If deceit in a television commercial depends on what the viewer sees rather than on the means by which an image is projected, an advertiser *would* be deceptive if he knowingly put before the camera a genuine object whose qualities would be substantially upgraded by the photographic process. The Court below made exactly this observation in its first opinion (R. 41). Since that time, the Commission rendered two more opinions, submitted a brief to the Court below and submitted a certiorari petition and a brief to this Court. Yet it has nowhere discussed the point.* It is apparent that the reasoning by which the Commission created the instant issue would fall of its own weight as soon as the Commission

* In its second review, the Court of Appeals noted that the Commission had not seen fit to discuss this question (R. 138, n. 16).

faced up to the implications of such a situation; the Commission would be forced to recognize that the key question in determining the meaning and legality of television advertising is what the viewer sees, not the genuineness of the object in front of the camera.

Indeed, any other view would be inconsistent with the basic teaching that an advertisement is to be judged on the basis of the overall impression it conveys to the viewer. Advertisements are to be read in the light of "the ultimate impression upon the mind of the reader," and "considered in their entirety, and as they would be read by those to whom they appeal." They "are intended not 'to be carefully dissected with a dictionary at hand, but rather to produce an impression upon' prospective purchasers," *Aronberg* v. *Federal Trade Commission*, 132 F. 2d 165, 167 (7th Cir. 1943). See *Federal Trade Commission* v. *Sterling Drug Inc.*, 317 F. 2d 669, 674 (2d Cir. 1963); *Elliot Knitwear, Inc.* v. *Federal Trade Commission*, 266 F. 2d 787, 789 (2d Cir. 1959).

Moreover, this principle is the only one which makes sense in television cases. The Commission's discourse upon real "proof" (R. 49-52) is contradicted by the nature of the medium. The whole process of television reproduction is based upon an *impression* that a single, unified and continuous picture is being seen, when in fact the television camera and transmitter send to the television receiver a multitude of separate tiny picture elements which are placed before the human eye (Walker (ed.), *National Association of Broadcasters, Engineering Handbook*, 5th ed. McGraw-Hill (1960) at pp. 5-3 to 5-5). This is accomplished by a complex, and necessarily "adjusted", system of transmission which, in a line-scanning process, puts 30 complete image frames per second upon the picture tube face; it is because of human "persistence of vision" that complete

images are seen and continuity of action portrayed (*Id.* at pp. 5-4 to 5-8; 4-140; 4-153 to 4-156). In the light of the physics of television it is naive to concentrate upon the object in front of the camera; what matters is what a viewer "sees" on the face of his television set.

If the Commission were correct in this case, its logic would lead it to bar all television advertising which is not accompanied by a lecture explaining how television works.

It is submitted that the only rational criterion for judging television advertising against the terms of Section 5 of the Act is whether truth is conveyed to the viewer, *i.e.*, whether the product will actually do what the viewer has seen it do on his television screen.

B. An Accurate Test, Experiment or Demonstration Using a Truthful Mock-up Makes no Misrepresentation.

The Commission's brief is based on the assertion that Colgate made a "deliberately false representation" that no mock-up was employed and that "this representation was material in the sense that it furnished an important inducement to the buyer" (Gov. Br. 9, 11-12).

This argument was made and rejected below. As the Court of Appeals put it:

> "The Commission's real objection, of course, is not to the resort to a mock-up, but to the implied representation that none is employed. This is apparent not only from the cases it regards apposite, which involve positive affirmations, such as that the manufacturer had (contrary to fact) received an award, or testimonials, or orders from certain customers, but also specifically from its conclusion that respondents' advertisement would be no worse, 'only more explicit' if the announcer had affirmatively stated, 'This is real sandpaper' " (R. 137).

The Court rejected the Commission's argument:

> "If there is an accurate portrayal of the product's attributes or performance, there is no deceit" (R. 138).

It is submitted that this ruling of the Court of Appeals is sound and that the Commission's view is, as the Court put it, "short on analysis" (R. 138).

The Court made clear that the Commission's error was to confuse the substantive claim made for a product with the means by which such claim was conveyed:

> "In seeking to stress the extent of misrepresentation by mock-up the Commission sometimes loses sight of the difference between a mock-up which presents an accurate portrayal and one . . . that effects a basic deception" (R. 137).

Such confusion is inexcusable. Under the Commission's own hypothesis, Colgate's representations were that (1) sandpaper could be shaved in a certain way after the application of Palmolive Rapid Shave; and (2) a demonstration could be performed showing that Palmolive Rapid Shave could do exactly this. Again under the Commission's own hypothesis, both representations are true.

The Commission claims that an additional representation was made, namely, that the demonstration in the advertisements was then and there being performed without the use of a mock-up. Such a representation was not made explicitly—and the Commission in effect admits as much (R. 60, n. 12).

The Commission's assertion is thus that under its "theory of law" a representation is to be *implied* that no mock-up was used.

It is submitted, rather, than no such representation is to be implied or, in any case, that any such implied representation would be immaterial.*

The Court of Appeals made clear why no implied representation should be imported into the case through the Commission's legal theory. The Court held there was no more reason for implying a representation that no mock-up was used in a test or experiment situation than there was in any other kind of television advertisement (R. 137-38).

Indeed, the Court reduced the Commission's theory to the absurd. The Commission argued that whereas a purchaser of ice cream "would be indifferent to the use of [a] mock-up" (R. 134), a purchaser of shaving cream would be " 'morally disillusioned' " if he learned that a mock-up had been used for sandpaper (R. 134). The Court pointed out that the Commission's ratiocination had thus led the Commission to the paradox of approving a mock-up of the product itself in the case of ice cream while condemning a situation where a manufacturer of shaving cream used a mock-up for an entirely collateral substance, sandpaper (R. 138). The Court concluded:

> "Yet we cannot see why if the representation is to be implied in one instance it is not in the other" (R. 138).

This was simple logic. The Commission's attempt to distinguish a "portrayal" or "illustration" on the one hand from "visual proof" on the other made no sense. On television (or in a printed advertisement, for that matter) how can a visual "portrayal" of a claim be any different from "visual proof" of a claim? In both cases, something pictorial is shown to a viewer. In both cases the advertiser makes a claim as to a quality of the product

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* The Commission concedes that only a "material" misrepresentation violates the Act (R. 52, n. 2).

advertised. In neither case is there a basis for implying an additional representation that the "genuine" is being photographed.

Rejecting the attempted distinction in "materiality" generally, the Court found that in either case—sandpaper or ice cream—"the buyer is interested in what he thinks he sees, and if what he buys can do and has done exactly what he thinks he sees it do, he has not been misled to any substantial degree" (R. 136).* Applying this reasoning, if after the application of Palmolive Rapid Shave real sandpaper could in fact be shaved precisely as claimed, the consumer would be no less indifferent to the use of the prop than the purchaser of the ice cream so long as both products actually looked and functioned as they had on television.**

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* This general proposition cuts across the arguments made at pp. 20-1 of the Commission's brief. A buyer relies upon the claims made for the product and, by hypothesis, those claims are true. Thus, purchasers are not misled and all sellers compete on the same ground: basic truthfulness.

** The Commission's brief relies heavily upon *Federal Trade Commission* v. *Standard Education Soc.*, 302 U. S. 112, and *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67, asserting that the doctrine of those cases disposes of the present issue. Those cases hold, as do the cases cited in footnote 3 of the Commission's brief (p. 14), that the product must have the quality or attribute, however "extrinsic", which is explicitly held out as a material inducement to the consumer to buy. Contrary to the implication of the Commission's brief, the Court below did not disregard this settled doctrine. Rather, it applied the rule to every aspect of the facts in this case. In its first opinion, the Court expressly held, "If a misrepresentation is calculated to affect a buyer's judgment it does not make a fair business practice to say the judgment was capricious. *Mohawk Refining Corp.* v. *F. T. C.*, 3rd Cir., 1959, 263 F. 2d 818, *cert. den.* 361 U. S. 814; *C. Howard Hunt Pen Co.* v. *F. T. C.*, 3rd Cir. 1952, 197 F. 2d 273" (R. 38). By this holding it upheld Commission findings directed at that portion of the advertising not before this Court. It also held, however, in respect to the Commission's mock-up theory, that the Commission had failed to show that any representation actually affecting a buyer's judgment had been made. If the Court of Appeals was wrong, this cannot be demonstrated simply by pointing to the legal standard which the Court faithfully applied.

The Commission's error is pointed up by the Court of Appeals' discussion of pre-recording. As noted in the Statement, the Court made clear that a pre-recorded "test" gave only the advertiser's "word" that the test could always be carried out; yet the Commission did not attack pre-recorded tests as materially deceptive for failing to disclose the fact of pre-recording (R. 137). The Court concluded: "We see little difference between this and taking his word that the test depicted is a faithful reproduction in other respects" (R. 137).

In brief, the Court scrutinized the Commission's "theory of law" by which an "implied" representation was injected into this case and found that the theory was divorced from reality and tangibly inconsistent. It is submitted that the Court was eminently correct.

C. The Commission's Position Is Unprecedented and Is Without Support.

The utter lack of support for the Commission's position is underscored by its failure to produce any evidence relating to the issue before this Court. Admittedly, the Commission is not required to adduce evidence of deceptive effects in every case. But surely some effort in that direction is appropriate in what the petition for certiorari proclaimed to be "a test case of major importance . . ." (p. 8).*

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* Certainly the Commission's conduct here is at variance with its conduct in the two cases upon which it chiefly relies. In *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67, involving a specific branding practice in one section of a single industry, the Commission conducted an "elaborate inquiry" in which it gained a "wealth of information" (291 U. S. at 75). Similarly, in *Federal Trade Commission* v. *Standard Education Soc.*, 302 U. S. 112, the Commission relied upon the testimony of witnesses from "ten states—teachers, doctors, college professors, club women, business men" (302 U. S. at 117).

The lack of evidentiary support here is all the more remarkable because the Commission's position represents a sharp break with its earlier publicly-announced policy. The Court of Appeals for the Fifth Circuit stated in the *Carter* case of the Commission's new position, "It was not always thus" and cited a public statement of the Commission's former Chairman Kintner made late in the same year as the Palmolive Rapid Shave advertisements were shown:

> "We realize that it is often difficult to impart true life quality to a product when it is photographed for television. . . .
>
> "Where the use of props does not result in a material deception, the Federal Trade Commission would have no reason to complain. . . .
>
> "Obviously, we recognize that it is impossible to photograph ice cream properly under hot lights. If you have to use shaving cream to get the kind of head which is normal on a glass of beer, this probably would not represent a material deception, unless, of course, it was carried beyond a reasonable point. If a glass goblet glistens too much, we still aren't likely to be alarmed" (323 F. 2d at 529, n. 10, citing Advertising Age, Vol. 30 No. 47, p. 1, November 23, 1959).

In that same month, there was published a report of a meeting of the Chairman and staff members of the Commission with officers of the Association of National Advertisers, Inc. Noting that it had been reviewed by Chairman Kintner prior to its publication, the report states:

> "F. T. C. recognizes a rule of reason. . . . A theatrical artifice, to be condemned by the Commission, must represent a material deception as to the characteristics, performance or appearance of a product. . . . In general, F. T. C. is not concerned with what goes on in the act of bringing a TV picture

to the screen—rather they are concerned with what the viewer sees" (Special Report to A. N. A. Members, "A. N. A. Officers Meet With FTC to Seek Standards for TV Visual Presentation", November 24, 1959, p. 2).

The hasty change in policy had foreseeable clumsy consequences. In addition to the irrationality in concept exposed by the Court of Appeals, the new doctrine has already become irrational in application. The *Carter* case, *supra,* involved a demonstration where a mock-up of shaving cream was used in a shaving cream advertisement —and without any claim that there was a photographic need to use a mock-up. The Commission's brief in the *Carter* case argued to the Fifth Circuit that Carter's offense was greater than Colgate's (p. 27). Not only was there no photographic need, but *Carter* involved disparagement of other shaving creams, whereas Colgate "was not in the business of selling sandpaper, and did not in any way compete with those who do." As a result, there was, argued the Commission's brief, a "manifest—indeed, critical—dichotomy" between the two (*Ibid.*). Yet, after remand from the Fifth Circuit rejecting the Commission's views on mock-ups, the Commission did not seek certiorari from this Court, but instead issued a modified order which does not prohibit truthful mock-ups (*Carter Products, Inc.,* Dkt. 7943 issued Dec. 6, 1963 and released Dec. 27, 1963).

It would seem clear that a policy reversal so deficient in logic, so lacking in evidentiary support, so abruptly reached and so irrationally enforced reveals an underlying confusion which the Court of Appeals properly struck down.

II.

The order of the Commission is patently ambiguous because the Commission's "theory of law" is illogical and inconsistent.

The order prohibits any "test, experiment or demonstration" which "is represented to the public as actual proof of a claim made for [a] product", and which utilizes an undisclosed prop or mock-up. In the Commission's exegesis, a truthful mock-up in an advertisement is illegal if "visual proof" is offered but proper if a product claim is illustrated or portrayed (R. 133, n. 6, 134). Thus, the line between the legal and illegal at the risk of penalties of $5,000 a day for each violation* is totally blurred.

As the Court below recognized, this ambiguity derives primarily from the "great difficulty" which must necessarily attend an effort to outlaw some mock-ups and to permit others (R. 135).** The problem is one of basic legality; as the Court below stated, it stems from the fact that "we find no substantial logical difference between what the Commission disapproves of and what it accepts" (R. 135).

The confusion in the order was demonstrated by the examples discussed by the Court. Thus, the Court could not agree that there was any practical difference between visual proof and illustration of a claim (R. 135). It saw no distinction between the delicious-seeming ice cream example and a mock-up of sandpaper (R. 135, 138). The Court found similar difficulties applying the order to other mock-

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*15 U. S. C. § 45(*l*).

** The Court below stated that "we envisage great difficulty in determining any dividing line between what is and what is not a test or experiment. . . ." (R. 135)

ups like the "bedsheet" and "Lipsom's Tea" examples (R. 135, 136).* These problem-prone examples were not, the Court concluded, "the product of a fertile imagination, but . . . the result of ephemeral examination of current TV commercials" (R. 136).

In rejecting the practicability as well as the logic of these distinctions, the Court below cited *Federal Trade Commission* v. *Henry Broch & Co.*, 368 U. S. 360, 367-68, in which this Court made clear:

> "The severity of possible penalties prescribed by the amendments for violations of orders which have become final underlines the necessity for fashioning orders which are, at the outset, sufficiently clear and precise to avoid raising serious questions as to their meaning and application."**

It is submitted that the Commission's order fails to meet the *Broch* standard. It is also submitted that the ambiguities in the order cannot be cured by verbal changes. The "great difficulty" found by the Court of Appeals is rooted in the Commission's basic legal theory. Only when that theory is set aside can a proper order be formulated.

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* The bedsheet example involved use of a blue bedsheet which photographed as white in connection with a soap advertisement (R. 135). With respect to this example, the opinion of the Court below demonstrated the following obvious ambiguities in the order: Does such a depiction merely "display or illustrate a claim," or does it imply a test? If a test is implied, is the depiction proof of a claim by means of "an experiment before the eyes of the viewer"? If the sheet were shown being removed from a washing machine, would this constitute an illegal "demonstration"? (R. 135-36).

The Court below also found other words and phrases in the order difficult to apply. The bedsheet example demonstrates the nature of the ambiguity in some of these terms. Does, for example, such a depiction constitute "actual proof" of a "claim"? How could an advertiser possibly determine if it is "material to inducing its sale"?

** The *Broch* case is not cited or discussed in the Commission's brief to this Court.

III.

The Court of Appeals exercised its proper function in reviewing the Commission's "theory of law".

The Commission urges in Point II of its brief that the Court of Appeals exceeded the proper bounds of judicial review in setting aside the Commission's order.

It comes with ill grace for the Commission to complain of failures in the agency-court relationship after the Court of Appeals considered the Commission's order so comprehensively in its first opinion (R. 35 *ff.*) and thereafter was willing expressly to "make an exception" (R. 133) and reconsider the Commission's position on the merits in a second opinion as patient and detailed as was its first review (R. 131 *ff.*).

In any case, the Court of Appeals did not exceed the limits of judicial review of the Commission's decision. The judicial power extends to review of the agency's interpretation of the law (see, e.g., *Federal Trade Commission* v. *Gratz*, 253 U. S. 421); the sufficiency of the evidence to support its application of the law (*Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643); and the reasonableness of the proscription in relation to the harm sought to be avoided (*Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U. S. 608). It is submitted that the Court below in no way exceeded its power.

This case was particularly appropriate for close judicial scrutiny. The decision of the Commission did not claim to be a determination of fact purporting to rely on Commission expertise, but was rather a rule of law newly announced by the Commission. The Commission itself stated that "our

[first] opinion failed to spell out sufficiently the *theory of law** on which the order was based. . . ." (R. 48) and repeated in its certiorari petition that "the Commission undertook in a second opinion to reconsider the entire case, restating the *theory of law* on which the 'demonstration' part of the order was based" [Pet. 4].

When the question is the interpretation of the legal standards of the Act, while the Commission's interpretation is of weight, it is ultimately for the courts to say whether it is right or wrong. See *Federal Trade Commission* v. *Gratz*, 253 U. S. 421, 427; *Federal Trade Commission* v. *R. F. Keppel & Bro., Inc.*, 291 U. S. 304, 314. *Cf. Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U. S. 61, 81.

The Commission's brief, however, attempts to make of the decision below what it is not: an expression of disagreement with the Commission on matters confided to agency discretion. The Commission argues that the Court below improperly assessed "the balance of harms and needs," and that in any event such an assessment is for the Commission; it asserts that the Court held that the "occasional need to use substitutes" outweighed the harm caused by *material deception*, and that this judgment was incorrect and improper (Gov. Br. 17). It concludes, if "material misrepresentations are ever to be tolerated . . . it is for the Commission . . . to make the determination" (Gov. Br. 17).

The Commission's argument is itself a material misrepresentation of the Court's opinion. The Court did not hold that material misrepresentations were to be

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* Emphasis supplied throughout, unless otherwise noted.

countenanced.* As pointed out above, the Court held that the Commission's views were "short on analysis" and resulted in a "paradox" (R. 138); it held that the Commission was illogical in creating an implied misrepresentation and concluded that, in any event, no material misrepresentation occurred (R. 138). It is elementary that the Court's power to review extends to a determination of whether there is a "rational basis" for the Commission's decision. (See *Grace Line Inc.* v. *Federal Maritime Board*, 263 F. 2d 709, 711 (2d Cir. 1959), and cases there cited.)

Far from demonstrating that the Court was wrong, the Commission's brief repeats a further defect which the Court of Appeals found in the Commission's own analysis of this issue—that "In seeking to stress the extent of misrepresentation by mock-up the Commission sometimes loses sight of the difference between a mock-up which presents an accurate portrayal and one . . . that effects a basic deception" (R. 137).

The Commission's brief argues that "If *sham* tests are permissible, there is no means by which sellers of a *superior* product can convince skeptical purchasers of the *truthfulness* of their claims by furnishing visual, experimental proof to confirm their say-so. For the viewer will not be able to distinguish the real experimental proof from the rigged test and therefore will not be able to rely on any televised 'demonstration' of superiority" (Gov. Br. 20). The brief elsewhere freely sprinkles its discussion with "rigged", "sham", "fake", etc. (Gov. Br. 2, 3, 8, 9, 10, 11, 13, 16, 17, 19, 20, 21, 25).

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* The only "assessment" performed by the Court was accompanied by a specific disclaimer as to the basis of its decision:

> "While we do not make this the basis of our decision, we reiterate our former observation that an enforced remedy should not outdistance the need" (R. 139).

This argument is wholly spurious. "Sham", "rigged" and "fake", for the purposes of this case, necessarily mean only that a truthful mock-up was used—and it means this exclusively, for under the Commission's own hypothesis the visual impression conveyed to the viewer is precisely accurate and corresponds exactly with what the viewer would see if he himself saw a live demonstration. Therefore, by hypothesis, the viewer may indeed rely on such a demonstration of superiority.*

Similarly, the Commission is confusing an actually "superior" product—superior in the sense that the product really can do what is claimed for it—with a product which is "superior" solely because it by happenstance possesses the quality of televising accurately.

The brief also argues that the Court of Appeals rested its decision "in large part on problems of compliance, administration and enforcement" (p. 21).** This is again a material misrepresentation of the Court's opinion. The Court's discussion of the problems implicit in administering the Commission's order was directed to the underlying illogic of the theory on which the order was based. By pos-

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* This confusion runs deep. The Court may note that the Question Presented in the Commission's petition for certiorari was at least straightforward enough to contain a parenthesis stating of the product claim that it "may itself be true" (p. 2); the Question Presented in the Commission's main brief no longer is willing to bring this fact to this Court's attention (p. 2).

** In its petition for certiorari, the Commission argued "that the Commission could fairly conclude that the difficulties of defining sham demonstrations are less serious than the alternative method of dealing with the problem, including that suggested by the Court below" (Pet. 17). In its opposing brief Colgate pointed out that the Commission had never considered the "alternative method of dealing with the problem"—or indeed any alternative—and that the Court made its suggestion in response to an argument of counsel, made for the first time, that the use of mock-ups presented policing problems (p. 11). Perhaps for this reason, the point has been dropped in the Commission's brief on the merits.

ing examples in problems of compliance, the Court merely illustrated the inadequacy of the Commission's basic analysis. As it said:

> "[W]e envisage great difficulty in determining any dividing line between what is and what is not a test or experiment, or in defining what is a demonstration in the nature of such. *Primarily this may be because we find no substantial logical difference between what the Commission disapproves of and what it accepts*" (R. 135).

Petitioner's brief points to the Commission's willingness to give advance advice (Gov. Br. 23) and to the *National Lead* doctrine (Gov. Br. 25) as if the Court's objection was solely to the ambiguity and scope of the particular order. As noted, however, the Court's fundamental objection to the order is that there is no underlying rational basis for it (R. 136, 138). In fact, the Court took note of the Commission's continued reference to the possibility of advance advice and observed, "We think the very suggestion indicates the Commission's failure to realize the scope of the problem" (R. 136, n. 12).

It is obvious that to the Court the suggestion highlighted the Commission's failure to appreciate the irrationality and vagueness of its legal theory. The Court was amply justified. If a legal theory is defective, advance advice is an exercise in futility. Moreover, the Commission's suggestion is impractical even on its own terms: proposed advertising cannot wait for a prior license.* We

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* The instant situation is wholly different from *Vanity Fair Paper Mills, Inc.* v. *Federal Trade Commission*, 311 F. 2d 480, 488 (2d Cir. 1962), cited by the Commission (Gov. Br. 24), which involved a single advertising allowance program. The problem here involves many discrete television and pictorial advertisements which are continuously produced. Colgate alone manufactures several hundred products.

repeat, however, that the basic issue is not one of practicality. If the Commission's advance advice were sufficient to uphold its ambiguous orders, the *Broch* case has no purpose. Indeed, *Broch* itself, though applicable, does not dig to the foundation of this case: the illegality implied by the Commission does not exist.

It is submitted that the Commission's brief has failed to face up to the holdings of the Court. Instead of pointing out where the Court of Appeals was wrong in applying indisputably correct standards of review, it acts as though the Court applied the wrong standards. In this effort, the Commission (1) has blurred the underlying factual assumption in this case—that a precisely accurate image is placed upon the television screen; (2) has reiterated rules of law about which there is no dispute; and (3) has cited cases on the tailoring of orders to proven offenses which are totally inapplicable when there is no offense in the first place.

The Court of Appeals in two opinions thoroughly and patiently explored the Commission's reasoning and found it wanting. It is submitted that if an administrative agency's decision ever received careful and proper judicial review, this case is it.

IV.

The petition for certiorari was not sought within the period allowed by law.

In addition to lacking substantive merit, the instant writ of certiorari should be dismissed because it was not sought within the period required by the Federal Trade Commission Act and the Judicial Code.

A. The Manner in Which the Commission Proceeded.

The writ of certiorari challenges the First Circuit's rejection of the Commission's ruling that the mere use of the sandpaper mock-up was in itself an independent illegal "practice" under Section 5 of the Federal Trade Commission Act. The writ is addressed only to this substantive issue.*

This very issue was presented to, and was considered and resolved by the Court of Appeals on November 20, 1962. The mandate which the First Circuit issued on that date did not hold the question in abeyance and order a further administrative determination thereon. Instead, the Court below squarely determined the truthful mock-up matter and exonerated respondents on this issue.

Confronted with this November 20, 1962 mandate, the Commission chose not to seek rehearing or reargument,** and also chose not to seek certiorari.

Instead, the Commission chose to accept the First Circuit's mandate, but then disregarded its clear command. Instead of fashioning a remedy "in accordance with" the Court's ruling on the truthful mock-up question, the Commission proceeded on the same record to issue a new order which repeated the Commission's prohibition. The Com-

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* It is not addressed to the remedial issue of whether the Commission's present order was rendered in accordance with the November 20, 1962 mandate of the Court below.

** The rules of the First Circuit permitted a motion for rehearing to be made within 15 days "after judgment is entered, unless the time is enlarged by order of the Court" (1st Cir. R. 31). However, when the First Circuit issued its November 20, 1962 mandate in this case, it had just previously, in another case involving the Commission, strongly rejected as untimely additional subsidiary arguments made in a duly filed petition for rehearing. See *Carr* v. *Federal Trade Commission*, 302 F. 2d 688 (1st Cir. 1962). By proceeding as it did, the Commission obviously was seeking to avoid renewing its arguments in such a posture.

mission also issued a new opinion which not only reiterated its already-rejected ruling, but also employed the same legal theory in support thereof.*

In an effort to justify this extraordinary procedure, the Commission claimed that reconsideration was appropriate because its earlier presentation to the First Circuit had been unsatisfactory "due in large measure to 'extreme arguments' made by its counsel" (R. 98, 132 n. 4). The Commission also intimated that the Court below set aside its first cease and desist order merely because the order indiscriminately forbade all, and not just some truthful mock-ups (R. 48, 97-98). These rationalizations defy the plain language of the November 20, 1962 mandate. Instead of basing its ruling on any narrow ground, the Court below, with the example of the sandpaper demonstration before it for determination, examined the basic legal question of whether the mere use of a mock-up in the actual challenged advertising was in any respect a violation of the Act—and concluded that it was not (R. 39-43).

The Commission's failure to abide by the Court's clear holding on the truthful mock-up issue resulted in the case being brought before the Court of Appeals again on June 6, 1963. On December 17, 1963, the Court of Appeals again set aside the order of the Commission. Rather than modifying its November 20, 1962 holding on the truthful mock-up issue, the Court's second decision fully reiterated that

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* The Commission's emphasis on such factors as (1) the sandpaper mock-up as the "heart" of the commercials; (2) the materiality of the mock-up's use as part of a test that "was, in reality, not taking place"; (3) the fact that this allegedly "faked" test purported to present "visible proof" of the product's attributes or qualities; (4) the distinction between the sandpaper test and other allegedly "harmless mock-ups"—had all been previously presented in its first opinion. As the Commission's brief states: "In its opinion on remand, the Commission restated its theory. . . ." (Gov. Br. 4).

holding in every respect. Only thereafter did the Commission for the first time seek certiorari on the question.

B. By Proceeding As It Did, the Commission Ignored Statutory Requirements.

The Federal Trade Commission Act and the Judicial Code clearly set forth the procedures to be followed in regard to judicial review of Commission cease and desist orders.

1. The Federal Trade Commission Act.

Under Section 5(c) of the Federal Trade Commission Act, all initial cease and desist orders of the Commission, and their concomitant "reports" or opinions, are subject to review by the courts of appeals, which have the "power to make and enter a decree affirming, modifying or setting aside the order of the Commission." However, Section 5(c) also requires that the review which it authorizes is to culminate in a judgment and decree by the court of appeals which "shall be final" (15 U. S. C. §45(c)), subject to review by this Court as provided in Title 28 U. S. C. §2101.*

Therefore, after the November 20, 1962 remand was accepted, the Commission was no longer free to fashion a

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* The Commission's reliance upon the rule expressed in *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U. S. 80, 94 (R. 98), is completely misplaced. In *Chenery*, the SEC had not applied the statutory standard established for it by Congress but had instead based its order upon an erroneous non-statutory standard. Hence, the Court, on its initial review, could not render a final determination as to whether the agency's order could stand if the appropriate standard had been applied. It could only remand with instructions for the SEC to evaluate the facts according to this statutory standard. Only after the SEC did so could the Court, on its subsequent review, *for the first time* determine whether the administrative application of the statutory test had been correct. *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U. S. 194, 198-201.

new order or opinion "in the same manner as though no prior order of the Commission had been rendered" (15 U. S. C. §45(j)). Thereafter, the further proceedings in this case were governed by the limitations contained in Section 5(i) of the Act (15 U. S. C. §45(i)).*

Section 5(i) encompasses the procedures to be followed after "a decree has achieved finality" under Section 5(c), and therefore it, of course, precludes the Commission from issuing a new order and report *de novo*. Instead, Section 5(i) requires that whatever new order is issued by the Commission must be "rendered in accordance with the mandate of the court of appeals" which "modified or set aside" the initial order of the Commission.

The plain language of Sections 5(c) and (i) demonstrates Congress' determination to foreclose an administrative reassertion or restatement, on the same record, that the same facts already found to be unobjectionable on the earlier review by the Court of Appeals nevertheless constitute a violation of the Act. Such action obviously would be in defiance of, rather than "in accordance with" the earlier judicial mandate which the Act requires "shall be final". See also *Virginia Lincoln Furniture Corp.* v. *Commissioner*, 67 F. 2d 8 (4th Cir. 1933), cited by the Court below as dealing with a "comparable provision under the revenue acts" (R. 132).

The Congressional purpose to prevent this manifests fair play and common sense. Any other construction of these provisions would permit the Commission to make its

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* The Court below recognized this and noted in its second opinion that the Commission's actions after receiving the November 20, 1962 remand were governed by the limitations of Section 5(i) (R. 132). After pointing to the applicable restrictions of Section 5(i), the Court in its second decision nevertheless reiterated its position as to the merits merely as a matter of grace "in view of the Commission's antipathy to mock-ups" (R. 133).

arguments, and if the judicial resolution of an issue were not favorable, to reassert or change them as it pleased. In short, the Commission would proceed *de novo* as though the earlier judicial decision had never been rendered, and thus ignore the elementary principles of finality.*

Since the writ of certiorari here is addressed to the underlying legality of the use of a truthful mock-up, which was determined by the November 20, 1962 mandate of the Court of Appeals, it deviates from the narrow remedial subject matter that is administratively and judicially reviewable under the Act after the remand of that mandate was accepted by the Commission. The Commission's attempt to go beyond the statutory limitations imposed by Congress under Sections 5(c) and (i) may not be countenanced.

2. The Judicial Code.

The plain language of Section 2101 of the Judicial Code contains a jurisdictional limitation on the period for seeking certiorari which also precludes the broad review sought by the Commission.

Rather than merely qualifying the right of a litigant to seek certiorari, Section 2101 circumscribes the power of the Court to entertain a writ; the statutory deadline is mandatory and jurisdictional in nature. See *Matton Steamboat Co.* v. *Murphy*, 319 U. S. 412, which recognized, in dealing with the predecessor of Section 2101 that "its language is peremptory", so that

* This Court has held that "litigation must at some definite point be brought to an end" (*Federal Trade Commission* v. *Minneapolis Honeywell Regulator Co.*, 344 U. S. 206, 213) and that "[a] pragmatic approach to the question of finality has been considered essential to the achievement of the 'just, speedy and inexpensive determination of every action': the touchstones of federal procedure," *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 306.

> "... after the expiration of the three months period, * * * this Court is without jurisdiction to entertain the appeals, which are accordingly dismissed" (319 U. S. at 414-15).*

The fact that the November 20, 1962 mandate of the Court below was confirmed without qualification over a year later on a new appeal brought by respondents to obtain relief from the Commission's improper actions does not revive the jurisdictional statutory deadline with respect to the truthful mock-up issue. Once a final judgment and decree is rendered by the Court of Appeals, the time period established by Section 2101 for obtaining certiorari is not extended by "the mere fact that [the] judgment previously entered has been reentered or revised in an immaterial way." *Federal Trade Commission* v. *Minneapolis Honeywell Regulator Co.*, 344 U. S. 206, 211:

> "Only when the lower court changes matters of substance, or resolves a genuine ambiguity, in a judgment previously rendered should the period within which an appeal must be taken or a petition for certiorari filed begin to run anew. The test is a practical one. The question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality" (344 U. S. at 211-12).

See also *Federal Power Commission* v. *Idaho Power Co.*, 344 U. S. 17, 20 ("If the Court did no more by the second judgment than to restate what it had decided by the first one, ... the 90 days would start to run from the first judgment.")

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* See also *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U. S. 399, 418; *Rust Land & Lumber Co.* v. *Jackson*, 250 U. S. 71, 76; Stern & Gressman, *Supreme Court Practice* §7-1 at p. 202 (3d ed. 1962).

Even if the subsequent confirmation by the Court of Appeals were somehow viewed as a rehearing, it could not revive the jurisdictional statutory deadline since that deadline had completely lapsed many months before. At this late date in the case, jurisdiction to review the truthful mock-up issue, having utterly lapsed, could not be regained by the mere subsequent confirmance of the earlier decree. See *Credit Co. Ltd.* v. *Arkansas Central Ry. Co.*, 128 U. S. 258, which recognized that a confirming decree entered after the jurisdictional deadline for seeking review had lapsed could not rejuvenate that deadline:

> "The attempt made, in this case, to anticipate the actual time of presenting and filing the appeal, by entering an order *nunc pro tunc*, does not help the case. When the time for taking an appeal has expired, it cannot be arrested or called back by a simple order of court. If it could be, the law which limits the time within which an appeal can be taken would be a dead letter." (128 U. S. at 261).*

Both *Safeway Stores* v. *Coe*, 136 F. 2d 771, 774-75 (D. C. Cir. 1943), and *Virginia Land Co.* v. *Miami Shipbuilding Corp.*, 201 F. 2d 506, 508 (5th Cir. 1953), interpret even the shorter deadline for seeking rehearing itself as being jurisdictional in nature, and therefore hold that no motion for rehearing, even if it is actually entertained,

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* See also *Shotkin* v. *Weksler*, 254 F. 2d 596, 597 (5th Cir. 1958), *cert. denied*, 358 U. S. 855 (motion for rehearing filed after deadline for appeal had lapsed "cannot revive the time for filing the notice of appeal which had already expired" even if the court below "considered the motion on the merits") and *United States* v. *Healey*, 376 U. S. 75, 77, citing *Allegrucci* v. *United States*, 372 U. S. 954, as an example of a case rejecting "an attempt to rejuvenate an extinguished right to appeal."

can extend the appeal deadline unless the motion is timely in every respect.*

Applying these precedents, the judicial power applicable to this case is not continuous and unqualified. Instead, it is curtailed by statutory restrictions which are mandatory and jurisdictional in nature. The governing limitations are clearly set forth in Sections 5(c) and (i) of the Federal Trade Commission Act, and in Section 2101 of the Judicial Code. These limitations compel the conclusion that the writ of certiorari raises a question which is time-barred and should be dismissed.

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* Compare *Denholm & McKay Co.* v. *Commissioner of Internal Revenue*, 132 F. 2d 243, 247-48 (1st Cir. 1942), which distinguishes the mandatory jurisdictional nature of the appeal deadline from that of the rehearing deadline.

Similarly, jurisdiction in a bankruptcy court is of a different nature from the appellate jurisdiction created for the Court below by the Federal Trade Commission Act (which contains Sections 5(c) and (i), and provides that the decree of the court of appeals "shall be final"). Jurisdiction in bankruptcy is continuous beyond the term of the court as to all matters, see 7 Moore, *Federal Practice* ¶ 73.01[5] at p. 3112 (1955 ed.).

Indeed, in bankruptcy, even certain time limitations for seeking review are not jurisdictional in nature. *Pfister* v. *Northern Illinois Finance Corp.*, 317 U. S. 144, 149. Since the limit is merely upon the right of the party, as opposed to the jurisdiction of the court, the court in its discretion may revive the right (317 U. S. at 151-53).

Professor Moore distinguishes the rehearing rule in bankruptcy from the rule under the Federal Rules of Civil Procedure which adopt "the rule formerly prevailing at law and in equity and under the better-described cases under the Civil Rules." 7 Moore, *Federal Practice*, *supra*, ¶73.09 at p. 3143.

Conclusion.

The judgment of the Court of Appeals should be affirmed or the writ of certiorari should be dismissed.

Respectfully submitted,

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